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SARAWAK COAL RESOURCES SDN BHD v. GENESIS FORCE SDN BHD

HIGH COURT SABAH & SARAWAK, KUCHING
MAIRIN IDANG JC
[SUIT NO: 22-161-2009-II]
B 15 JANUARY 2015

CIVIL PROCEDURE: *Striking out – Counterclaim – Application to strike out counterclaim – Issue of non-naming or re-naming of parties – Plaintiff in original action not named as defendant in counterclaim – Action filed before implementation of Rules of Court 2012 – Whether requirement under O.15 r. 3(1) Rules of Court 2012 could be made retrospective – Failure to raise issue in previous applications – Whether res judicata applied – Delay in filing applications – Whether applications bona fide*

CIVIL PROCEDURE: *Res judicata – Applicability – Application to strike out counterclaim – Issue of non-naming or re-naming of parties – Plaintiff in original action not named as defendant in counterclaim – Failure to raise issue in previous applications – Whether res judicata applied*

Sarawak Coal Resources Sdn Bhd ('SCR') filed a writ of summons and statement of claim against Genesis Force Sdn Bhd ('GF'). GF filed a defence and counterclaim and put in an application to add Syarikat SESCO Berhad ('SESCO') and the Government of Sarawak and some individuals ('Government & Ors') which was allowed. GF then filed its amended defence and amended counterclaim ('amended defence and counterclaim'). SCR made an application ('encl. 76') to strike out certain paragraphs in the amended defence and counterclaim and Government & Ors applied to strike out paragraphs of the amended counterclaim against themselves ('encl. 88') which were allowed by the Judicial Commissioner ('the learned JC'). Subsequently, SESCO and Government & Ors made an application in encl. 166 that the amended counterclaim by GF be struck out. The learned JC allowed encl. 166. GF thus appealed against all the decisions of the learned JC. The Court of Appeal allowed GF's appeal, and all encls. 76, 88 and 166 were struck out. There were no further appeals by SCR, SESCO and the Government & Ors. SESCO and Government & Ors, however, applied *via* encls. 199 and 208, to strike out the counterclaim since SCR being the plaintiff in the original action had not been named as a defendant in the counterclaim. SESCO and Government & Ors submitted that a defendant (by original action) was not entitled at law to file a counterclaim against third parties where the plaintiff (by original action) was not a defendant in the counterclaim, citing O. 15. r. 3(1) Rules of Court 2012 ('ROC 2012'). GF, however, argued that the matter was *res judicata* and submitted that the filing of the applications showed the desperate attempts of all the defendants to delay the proceedings and to prevent the matter from going to trial.

Held (dismissing defendants' applications):

(1) In the amended counterclaim, the defendant in the original action had been described and referred to as the plaintiff in the counterclaim. The plaintiff in the original action had also been properly described in the pleadings as the defendant. The rest of the defendants were described as the first, second, third, fourth and fifth defendants respectively. The parties in the counterclaim had been properly described and identified. Therefore, there was no confusion and/or embarrassment as alleged by the defendants. (para 13)

(2) The present action was filed before the implementation of the ROC 2012. Thus, although in the ROC 2012, the plaintiff in the original action has to be named as the defendant in the counterclaim together with the additional parties, the requirement could not be made retrospective. Order 94 r. 3 ROC 2012 states that "changes to procedural law which affect the substantive rights of the parties will take effect prospectively and not retrospectively". (para 14)

(3) SCR, SESCO and Government & Ors had not suffered any prejudice. The non-compliance, if any, was at most an irregularity that was curable and not a nullity. A technical non-compliance means non-compliance which is not fundamental and mandatory in nature. Under O. 2 ROC 2012, non- compliance with the rules is curable and "shall be treated as an irregularity and shall not nullify the proceedings". (para 17)

(4) *Res judicata* covers issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, though not actually decided by the court. It also covers a complaint or an issue that has or could have been disposed of in earlier proceedings between the same parties but was not done. The defendants herein ought to have raised this issue of non-compliance in the previous application. By them not having done so, it was now *res judicata*. (para 19)

(5) There was a delay in filing the applications which was unacceptable. The applications were not made within reasonable time. The defendants had also taken fresh steps after becoming aware of the irregularity or non-compliance. This court agreed with O. 2 r. 2 ROC 2012 which states "An application to set aside any proceedings, any step taken in any proceedings or any document, judgment or order therein for non-compliance with these rules shall not be allowed unless the application is made within reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity and the non-compliance has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs". (para 20)

(6) The defendants' conduct in filing the present applications could be construed as delaying tactics. All this time, the defendants had not raised the intention to strike out the counterclaim on non-naming of SCR in the counterclaim. There were no complaints by SCR or the other defendants in the counterclaim. The issue of 'non-naming' or 're-naming' could have been included in their previous application to strike out the counterclaim. It was four years later that the defendants seemingly saw the need to file another application on the 'non-naming' or 're-naming'. Enclosures 199 and 208 were thus *bona fide*. (paras 21 & 22)

Case(s) referred to:

Allianz General Insurance Malaysia Bhd v. Maxi Development Sdn Bhd & Ors [2014] 3 CLJ 1053 HC ***(refd)***

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Chang Chai Chin & Anor v. Superintendent of Lands and Surveys, Samarahan Division & Other Cases [2008] 8 CLJ 185 HC ***(refd)***

Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd [2001] 2 CLJ 321 CA ***(refd)***

Chemfert Sdn Bhd & Anor v. Lim Hua [2010] 7 CLJ 491 CA ***(refd)***

Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor [2014] 2 CLJ 525 FC ***(refd)***

Puspavathy Thaveethu v. Majlis Perbandaran Klang & Ors And Other Appeals [2008] 6 CLJ 626 CA ***(refd)***

Sabu Development Sdn Bhd v. Kelik Bayel [2007] 9 CLJ 475 HC ***(refd)***

Legislation referred to:

Rules of Court 2012, O. 1A, O. 2 r. 2, O. 15 r. 3(1), O. 94 r. 3

Other source(s) referred to:

Malaysian Court Practice, High Court (2004), para 15.3.3, p 133

Malaysian Court Practice 2012, para 15.3.2, p 908

For the plaintiff - Wong Li Ching; M/s George Lo & Partners Advocs

For the defendant - Jong Yee Ling; M/s Albert Tang Advocs

Reported by Suhainah Wahiduddin

JUDGMENT

Mairin Idang JC:

[1] On 10 November 2014, I dismissed encls. 199 and 208 with costs to Genesis Force Sdn Bhd. For convenience, I shall refer Genesis Force Sdn Bhd as GF, Sarawak Coal Resources Sdn Bhd as SCR, Syarikat SESCO Berhad as SESCO and Government of Sarawak and Dato Sri Ahmad Tarmizi bin Haji Sulaiman, Datu Wan Alwi bin Dato Sri Wan Hashim, Datu Sudarsono bin Osman as the Government & Ors respectively. I shall also be referring SESCO and the Government & Ors as defendants where necessary in my grounds of decision.

[2] By way of a background encl. 199 and encl. 208 (the applications) are applications by SESCO and the Government & Ors to strike out GF's counterclaim (the counterclaim). The applications were filed on the 28 March 2014 (encl. 199) and 28 April 2014 (encl. 208) respectively.

[3] SCR had filed a writ of summons dated 5 August 2009 and statement of claim dated 4 August 2009 against GF. GF filed a defence and counterclaim dated 24 November 2009. SCR filed a reply and defence to counterclaim dated 22 December 2009. GF then put in an application (encl. 62) dated 18 June 2010 to add SESCO and the Government & Ors in the counterclaim which was allowed by court on 13 July 2010. Following approval of encl. 62, GF filed its amended defence and amended counterclaim re-dated 13 July 2010 (amended defence and amended counterclaim). SESCO filed its memorandum of appearance dated 13 August 2010. The Government & Ors also filed their memorandum of appearance dated 13 August 2010.

[4] On 9 August 2010, SCR made an application in encl. 76 to strike out certain paragraphs in the amended defence and amended counterclaim. On 26 August 2010 in encl. 88 the Government & Ors also applied to strike out paras. 7 and 9 of the amended counterclaim against themselves. On 27 June 2012 Tuan Ravinthran N Paramaguru JC (the learned JC as he then was) allowed prayers 1 and 2 of encl. 76 and prayer (a) and (c) of encl. 88.

[5] On 12 July 2012 SESCO, the Government & Ors made an application in encl. 166 that the amended counterclaim by GF be struck out or alternatively SESCO, the Government & Ors be struck out as parties. On 24 October 2012, Tuan Ravinthran N Paramaguru JC allowed encl. 166. GF had appealed on all decisions of the learned JC (now judge) in encls. 76, 88 and 166. The Court of Appeal allowed GF's appeal, all encls. 76, 88 and 166 were struck out. There was no further appeals by SCR, SESCO and the Government & Ors.

[6] Basically, encls. 199 and 208 are applications by SESCO, the Government & Ors to strike out the counterclaim since SCR being the plaintiff in the original action now the defendant in the counterclaim has not been so named as a defendant in the counterclaim.

[7] I think the issue here is whether there is a need to rename SCR as the defendant in the counterclaim.

[8] Mr George Albert William Chapman, the Senior Legal Officer for SESCO had affirmed at p. 4 of his affidavit in support II: "I respectfully draw this Honourable Court's attention to exh. 'L2' to the AIO and it can be seen that there was no general title for the counterclaim at the material time when GF only counterclaimed against SCR. That claim and counterclaim was only between GF and SCR. SESCO was not a party to the action at that time".

Mr George Albert William Chapman went on to affirm at para. 5 of his affidavit in support II: "When GF elected to sue other parties, GF amended the general title of the action by adding a 'counterclaim' to it. In so doing, GF is required to name in the counterclaim SCR who is the plaintiff by original action. I am advised by counsel that GF's failure and refusal to name the plaintiff by original action in the counterclaim (despite being given opportunity to do so by this Honourable Court) renders the counterclaim defective and liable to be struck out". Mr George Albert William Chapman in para. 7 of his affidavit in support II also affirmed: "Even though SCR is referred to in the amended counterclaim, SCR is only referred to in the same capacity as the original counterclaim. It is not a 'defendant' in the counterclaim. It is not, and cannot be denied by GF that it has not named SCR as a defendant in the counterclaim".

[9] Mr Alvin Chung, counsel for the Government & Ors in para. 9 of the affidavit in support of their application had affirmed: "I respectfully state that the plaintiff (by counterclaim) is not entitled and/or empowered to institute a counterclaim against additional parties without naming the plaintiff (by original action) as a co-defendant in the counterclaim, therefore the counterclaim instituted by the plaintiff (by counterclaim) is a nullity and ought to be struck out as the plaintiff (by counterclaim) is not prepared to amend its counterclaim".

[10] Learned counsel for SESCO had submitted that a defendant (by original action) is not entitled at law to file a counterclaim against third parties where the plaintiff (by original action) is not a defendant in the counterclaim. Learned counsel for SESCO had cited O. 15 r. 3(1) ROC 2012, *Malaysian Court Practice 2012* at p. 908, para. 15.3.2 and the case of *Sabu Development Sdn Bhd v. Kelik Bayel* [2007] 9 CLJ 475. According to the counsel, this inevitably leads to an embarrassing pleading because the general title of the counterclaim shows clearly that there are only five defendants and SCR is not one of them. Learned counsel for the Government & Ors also submitted on similar grounds and both have urged me to strike out the counterclaim.

[11] Learned counsel for GF in summary had this to say: The matter is *res judicata*, issue estoppel apply, defendants barred from raising the current issue of 're-naming', not *bona fide*, vexatious and an abuse of court's process. GF further submitted that "There was never the issue of re-naming SCR as defendant in the counterclaim …" Learned counsel for GF had referred to the commentary in *Malaysian Court Practice, High Court* (2004) that refers to Form 20 (para. 15.3.3 at p. 133 of the commentary): "In the case of a counterclaim by the defendant against the plaintiff together with a third person or third persons as co-defendants, *a new title must be added describing the defendant as plaintiff and the third person as defendants therein*. See Form 20.

Learned counsel for GF said: 'This Form 20 is identical to Form 15 in the Rules of Court 2012". "In short, there was no necessity to name SCR as the defendant in the counterclaim, it is already a defendant in the counterclaim together with SESCO, the Government & Ors'. Counsel for GF went on to submit that the filing of the applications showed the desperate attempts of all the defendants to delay the proceedings and to prevent the matter from going to trial, and/or afterthought. It is also the contention of learned counsel for GF that any application to set aside shall not be entertained unless it is made within reasonable time and before taking any fresh steps and in the present applications there has been four years before the defendants filed their applications. (emphasis added)

[12] Learned counsel for GF said "the plea against the plaintiff (SCR) by way of counterclaim are clearly set out in the amended defence and amended counterclaim in particular the following paragraphs. For the purpose of illustration, I shall only reproduce here some of the paragraphs:

AMENDED COUNTERCLAIM

5. The **defendant (also the plaintiff in the counterclaim)** repeats paragraph 2 of the Amended defence.

7. The **defendant (also the plaintiff in the counterclaim)** avers that the 1st defendant (in the counterclaim) ...

Wherefore, the **defendant (also the plaintiff in the counterclaim)** counterclaims against the **plaintiff (in the original action)** and the defendants in the counterclaim

(emphasis added)

[13] Now what I notice in the AMENDED COUNTERCLAIM is that the defendant in the original action has been described and referred to as the plaintiff in the counterclaim. The plaintiff in the original action has also been properly described in the pleadings as the defendant. The rest of the defendants are described as the first, second, third, fourth and fifth defendants respectively. To me, the parties in the counterclaim have been properly described and identified. Therefore, there is no confusion and or an embarrassment as alleged by the defendants. I may add learned counsel for GF seems correct in his interpretation of para. 15.3.3 at p. 133 of the commentary in *Malaysian Court Practice, High Court* (2004): "In the case of a counterclaim by the defendant against the plaintiff together with a third person or third persons as co-defendants, *a new title must be added describing the defendant as plaintiff and the third person as defendants therein*. See Form 20". There is nothing in the commentary that says the plaintiff (in the original action) must be named as the defendant in the counterclaim unlike in the ROC 2012 which I shall refer to after. In this particular case, I have to bear in mind that this action was filed before the ROC 2012.

[14] Now it is urged upon me that although in the ROC 2012 the plaintiff in the original action has to be named as the defendant in the counterclaim together with the additional parties, the requirement cannot be made retrospective. Learned counsel for GF submitted that if there has been a change of rules now in ROC 2012 should not have retrospective effect: *Malaysian Trade Union Congress & Ors v. Menteri Tenaga, Air Dan Komunikasi & Anor* [2014] 2 CLJ 525: "It is the principle which governs the construction of rules of courts. A rule of court should not be interpreted in such a way as to result in unfairness or produce a manifest injustice". Learned counsel for GF also referred to O. 94 r. 3 ROC 2012 where it also mentioned that "changes to procedural law which affect the substantive rights of the parties will take effect prospectively and not retrospectively. I have said the present case was pre ROC 2012.

[15] But I have read the Malaysian Civil Procedure 2013 namely para. 15/3/2 therein. I think learned counsel for the defendants are correct in their submissions that SCR must be named as defendant in the counterclaim. According to para. 15/3/2 "Title of counterclaims against additional party" the practice is for this to be done as follows:

Between

A.B. …Plaintiff

and

C.D. …Defendant

(by original action)

and Between

C.D. …Plaintiff

and

1. A.B.

2. X.Y. …Defendants

(by counterclaim)

[16] Reading the title clearly, A.B. as the plaintiff in the original action has to be named A.B. as one of the defendants in the counterclaim. Had this action been filed after ROC 2012 then there was indeed non-compliance of O. 15 r. 3 of ROC 2012. I am however in agreement with learned counsel for GF that the requirement cannot be made retrospective.

[17] But learned counsel for GF also submitted even if there was non-compliance and that there was a need to 're-name' the plaintiff in the original action as the defendant in the counterclaim such non-compliance could not be a ground for allowing the striking out. His contention was that SCR, SESCO and Government & Ors have not suffered any prejudice. All

of them knew about GF's counterclaim against them all these while. It is also contended by learned counsel for GF the non-compliance if any was at most an irregularity and it is curable not a nullity. Counsel for GF had referred to me O. 1A Rules of Court 2012 (ROC) which provided that the court or judge shall have regards to justice (see *Chang Chai Chin & Anor v. Superintendent of Lands and Surveys, Samarahan Division & Other Cases* [2008] 8 CLJ 185; [2008] 2 MLJ 122. I am also being reminded that a technical non-compliance means non-compliance which is not fundamental and mandatory in nature. That under O. 2 ROC non-compliance with the rules is curable and "shall be treated as an irregularity and shall not nullify the proceedings" (See also *Puspavathy Thaveethu v. Majlis Perbandaran Klang & Ors And Other Appeals* [2008] 6 CLJ 626). I wholly agree with learned counsel for GF on the issue of the defendants not having suffered any prejudice and that the non-compliance is at most an irregularity, not fundamental and mandatory in nature.

[18] Counsel for GF also contended that the filing of these applications showed the desperate attempts of all the defendants to delay the proceedings and to prevent the matter from going to trial, and/or afterthought. The counsel said "I say that the applications are an afterthought because all these whilst SCR, SESCO and the Government & Ors had entered appearances. They could have filed the applications when they were named as defendants but did not do so for reason only known to them". It is further contended by learned counsel for GF that any application to set aside shall not be entertained unless it is made within reasonable time and before taking any fresh steps and in the present applications, there has been four years before the defendants filed their applications. Surely such applications lack good faith would even show that this was done with the intention of delaying the trail of the case.

[19] Learned counsel for GF also said the matter raised by the defendants in the applications is now *res judicata* and issue estoppel apply. Learned counsel contended that *res judicata* covers issues which might have been and which were not brought forward, either deliberately or due to negligence or inadvertence, though not actually decided by the court it also covers "a complaint or an issue that has or could have been disposed of in earlier proceedings between the same parties" but was not done (see *Asia Commercial Finance (M) Berhad v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783. See also *Chemfert Sdn Bhd & Anor v. Lim Hua* [2010] 7 CLJ 491; *Chee Pok Choy & Ors v. Scotch Leasing Sdn Bhd* [2001] 2 CLJ 321 and *Allianz General Insurance Malaysia Berhad v. Maxi Development Sdn Bhd & Ors* [2014] 3 CLJ 1053). I think this argument has basis. The defendants ought to have raised this issue of non-compliance in the previous application. By them not having done so it is now *res judicata*.

[20] But to me, there is definitely a delay in filing the applications. What other explanation for the four years delay. I see none that is acceptable. I agree with learned counsel for GF that the applications were not made within reasonable time and also that the defendants had taken fresh steps after becoming aware of the irregularity or non-compliance. Learned counsel for GF had referred to O. 2 r. 2 ROC 2012: "2.(1) An application to set aside any proceedings, any step taken in any proceedings or any document, judgment or order therein for non-compliance with these rules shall not be allowed unless the application is made within *reasonable time and before the party applying has taken any fresh step after becoming aware of the irregularity and the non-compliance* has occasioned a substantial miscarriage of justice or occasioned prejudice that cannot be cured either by amendment or an appropriate order for costs". I wholly agree with O. 2 r 2. Learned counsel for GF has urged upon me to dismiss the applications upon this ground. (emphasis added)

[21] The defendants could have done the striking out way back in 2010 when they filed encl. 88 which was the defendants' application to strike paras. 7 & 9 of the amended counterclaim. If the defendants were vigilant enough, they would have noticed the non-compliance. Parties are all represented by lawyers here. I agree with this argument that counsel for the defendants would have seen this 're-naming' when they filed their other applications. I am afraid the defendants conduct in filing the present applications could be construed as delaying tactics. As counsel for GF said: "For them to raise the issue of 're-naming' now when the matter was in fact fixed for trial on 17 - 21 March 2014 by the High Court, on top of that the defence to counterclaim fell due all show that it is an afterthought, not *bona fide* and an abuse of the court's process". All this time, the defendants have not raised the intention to strike the counterclaim on non-naming of SCR in the counterclaim. In short, there were no complaints by SCR or the other defendants in the counterclaim. But what is obvious would appear to me that the filing was staggered to obtain the maximum delay.

[22] Now should I allow the defendants' applications. In view of the discussion above, I think the conducts of the defendants are much to be desired. As I said the issue of 'non-naming' or 're-naming' could have been included in their previous application to strike out the counterclaim. It was four years later that defendants seemingly saw the need to file another application on the 'non-naming' or 're-naming'. As learned counsel for GF in conclusion said: "We say encl. 199 is like having a third bite at the proverbial cherry by SESCO". We say that encl. 208 is like having a fourth bite of the proverbial cherry by the other defendants in the counterclaim. Both encls. 199 and 208 are not *bona fide*". I agree there have been too many cherries here and I cannot allow another cherry. There is also the issues of *res judicata*, unreasonable delay and the further steps already taken by the defendants before filing the applications which I have considered and have

to consider. In the premises, I think the only decision that I must make here is to dismiss the defendants' applications with costs to GF. I shall also direct that GF is to amend the 'Title of the counterclaim' as per para. 15 above in tandem with para. 15/3/2 of *Malaysian Civil Procedure 2013*. Hopefully, parties would then move on expeditiously as this case is now going into its sixth year. As for the costs of RM10,000 to be paid by SESCO and the Government & Ors I have taken into account the conducts of the defendants in prosecuting their case which to me amounted to delaying tactics and being on piece meals basis. Accordingly I so order.